DOCUMENT RESUME

ED 176 261 CS 205 012

AUTHOR Huttenstine, Marian L.
TITLE Historical Perspectives on Privacy.
PUB DATE Aug 79
NOTE 29p.; Paper presented at the Annual Meeting of the Association for Education in Journalism (62nd, Houston, Texas, August 5-8, 1979)

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS *Civil Liberties; *Court Cases; Court Litigation; Disclosure; Freedom of Speech; Information Dissemination; Laws; *Legal Problems; *Mass Media; *News Reporting; *Privacy; Torts; United States History

ABSTRACT

A number of court cases involving public disclosure of private information are described in this paper to point to historical trends involving the issue of privacy and to illustrate some of the problems with all aspects of the issue. After noting the conflict between the principle of individual privacy and the principle of free disclosure of truth, the paper discusses the article written by Samuel Warren and Louis Brandeis in 1890 that was to be seminal in the development of privacy law; describes court cases reflecting early judicial concern for a protectable right of privacy, as well as cases reflecting early denials of the right of privacy; and tells of circumstances leading to the formulation of the privacy doctrine. It then discusses privacy issues with regard to the information media, noting the growth and strength of protection for the media, and describes media-related cases involving four different torts of privacy: appropriation of information for commercial gain, intrusion of privacy, publication of private information, and publication of information in a false light. The paper concludes by noting that privacy has become more frequently litigated, that it has become a topic of considerable direct interest to the public at large, that the privacy doctrine closely reflects the social climate, and that the problems involved in the law of privacy are far from being resolved. (GT)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED176261

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION

THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY

HISTORICAL PERSPECTIVES ON PRIVACY

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY
Marian L. Huttenstine

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

By
Marian L. Huttenstine
Assistant Professor
School of Communication
University of Alabama

Research Assistance
By
William J. Stone II
Masters Candidate
University of Alabama

Presented to the History Division, Association for Education in Journalism Annual Convention, Houston, Texas, August 1979.

CS2050/2

HISTORICAL PERSPECTIVES ON PRIVACY

> The right of privacy, in essence, is anti-social. It is the right of an individual to live a life of seclusion and anonymity, free from the prying curiosity which accompanies both fame and notoriety. It presupposes a desire to withdraw from the public gaze, to be free from the insatiable interest of the great mass of men in one who has risen above--or fallen below--the mean. It is a recognition of the dignity of solitude, of the majesty of man's free will and the power to mold his own destiny, of the sacred and inviolate nature of one's innermost self.
>
> Opposed to this ideal is the principle that the white light of publicity safeguards the public, that free disclosure of truth is the best protection against tyranny. Liberty is not the right of one but of many. The advance of civilization depends upon the dissemination of knowledge and society has an absolute right to be informed on matters bearing upon its protection and education. Frequently, the public has an interest in an individual which transcends his right to be let alone. Since the whole is greater than its component parts, private rights must often yield to public interest.[1]

Every lawsuit, indeed every legal action, represents the interplay of conflicting or opposing interests. Legal principles are averages, generalizations derived from specific instances of this interplay, balanced over time and events. Usually tracing the basic issue back through many cases reveals a "clean" pattern which is subject to application in predictable ways. That privacy has not achieved this legal precision goes without saying. Explanations for the problem center on its generalized application and history.

Even the meaning of privacy is subject to debate; although many people have approached the task, Professor Emerson's discussion is commonly accepted:

> (T)he concept of a right to privacy attempts to draw a line between the individual and the collective, between self and society. It seeks to assure the individual a zone in which to be an individual, not a member of the community. In that zone he can think his own thoughts, have his own secrets, live his own life, reveal only what he wants to the outside world. The right of privacy, in short, establishes an area excluded from the collective life, not governed by the rules of collective living.[2]

Where there are social problems, law must respond: "(p)olitical, social, and ecomonic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society."[3] The social need which ultimately created the right of privacy did not achieve sufficient strength to force this development until the period of industrial expansion, "when miraculous advances in

transportation and communication threatened to annihilate time and space."[4] There are those who claim that individual privacy had been sufficiently protected earlier by limits of human memory and transportation. However, both these limits were negated in part by the growth of the popular newspaper. Reaching for new readership, the press demonstrated the appeal of sensation. "Popularization, while inevitable if mass readership was to be achieved...could be used to emphasize sensationalism at the expense of news. Pulitzer's striking success had demonstrated once again the appeal of the age-old technique...Other papers, like the ...Boston Globe, were playing the same game..."[5]

Yellow journalism in Boston provided the impetus for the Warren and Brandeis article which was to be seminal in the development of privacy. That the article was a direct response to the newspaper cannot be ignored:

> Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what was whispered in the closet shall be proclaimed from the house-tops." For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons...[6]

But it was not just the technology to which the authors responded:

> The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle.[7]

Having developed the cause for a remedy under the law, the authors analyze existing law to support their concept. Although libel and slander provided certain insight, the indifferences were great" "(T)he wrongs and correlative rights recognized by the law of slander and libel are in their nature material rather than spiritual."[8] Through other aspects of common law, an applicable principle was traced: "The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others."[9]

In further support of the concept of a right to privacy as redressable under the

law, Warren and Brandeis examine the tortured reasoning of the courts in several cases involving republication of letters, sale of photographs, etc.[10] Noting the narrow application of the laws available and the "forced" reasoning of the courts, Warren and Brandeis conclude:

> (T)hat the rights, so protected, whatever their exact nature, are not rights arising from contract or from special trust, but are rights as against the world;..., the principle which has been applied to protect those rights is in reality not the principle of private property, unless that word is used in an extended and unusual sense. The principle...is the right to privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts, and to personal relation, domestic or otherwise."[11]

In essence then the authors build a right to an "inviolate personality" through extrapolation. Common law, with its capacity for response to changing issues, was the route preferred by Warren and Brandeis. "(C)ommon law provides..(a weapon), forged in the slow fire of the centuries, and today fitly tempered..."[12] Common law privacy, as they conceived it, could provide requisite protection without the interpositioning of state law of constitutional issues. Their legal prognosis is the more interesting as case law concerning privacy evolved through the maze of action on all legal levels.

Although recorded evidence is sadly lacking, it appears that the earliest American cases involving the unauthorized use of name, photograph, or characture, moved with extreme hesitation toward a legal concept of individual privacy protection. A photograph, surreptitiously taken, of a woman performing on the stage while clothed in tights is the cause for what is probably the first case.[13] Any unique principle of protection is avoided, but the state Supreme Court granted an interlocutory injunction restraining the publication to the picture. Absence of the defendant from the trial resulted in a permanent injunction. In an opinion which contained no discussion of the right of privacy, the court enjoined the use of a physician's name as part of an endorsement of patent medicine. The purported endorsement of the medicine was "an infringement of his right to the sole use of his own name."[14]

Three cases, two from New York and one from Massachusetts, may reflect very

early judicial awareness of the Warren-Brandeis article. Although the requested relief was limited, denied, or overturned in each case, the courts did discuss, in detail, the concept of privacy. In Schuyler[15] an injunction was granted, restraining public display of a statue. The Woman's Memorial Fund Association, in preparation for the Chicago Exposition, planned tributes to several "Typicals..." The statue of Mrs. Schuyler was to represent philantropists; that of Susan B. Anthony was to represent reformers. Although the defense claimed that the nephew and stepson were not proper parties for the action, the judge ruled: "it cannot be that by death all protection to the reputation of the dead, and the feelings of the living in connection with the dead, has absolutely been lost."[16] On appeal,[17] this reasoning was not persuasive; Judge Rufus V. Pechkam ruled that "the right of the living and not of the dead" was the heart of privacy action; "whatever right of privacy Mrs. Schuyler had died with her."[18]

Becoming a "public character" resulted in the presumption of waiver of the right of privacy in Corliss.[19] "Having asked for and sought public recognition" through, among other practices, the distribution of more than 10,000 pictures of himself, the court assumed this as sufficient cause to deny the injunction sought by the widow and children. Although an ordinary person might successfully have sought to limit the publication of manuscripts, paintings, etc., this route was denied one who achieved public recognition. This action, again taken on appeal, dissolved the injunction instituted by the lower court. Judge LeBaron B. Colt in so doing displayed an awareness of the role of information: "It would be a remarkable exception to the liberty of the press if the lives of great inventors could not be given to the public without their own consent while living, or the approval of their family when dead."[20] Privacy could not be sustained when it conflicted with freedom of expression:

> Freedom of speech and of the press is secured by the constitution of the United States and of most of the states. This constitutional privilege implies a right to freely utter and publish whatever the citizen may please, and to be protected from any responsibility for so doing, except so far as such publication, by reason of its blasphemy, obscenity, or scandalous character, may be a public offense, or by

> its falsehood and malice, may injuriously affect the standing, reputation, or pecuniary interests of individuals. In other words, one can speak and publish what he desires, provided he commits no offense against public morals or private reputation.[21]

Corliss is probably the earliest example of informational content at issue in a privacy case. However, the news media did not become a direct party to litigation until Marks v. Jaffa.[22] Joseph Jaffa, editor of Der Wachter, "created" a popularity contest between actors Marks and Mogulesko. Although Marks denied permission for the publication of his photograph, Jaffa ran photographs of both men. The readership was then invited to vote for the most popular. Marks entered a lawsuit in which he sought an injunction stopping publication. The judge, ruling in N.Y. during the period after the Schuyler initial trial, but before the appeal, wrote:

> If a person can be compelled to submit to have his name and profile put up in this manner for public criticism to test his popularity with certain people, he could be required to submit to the same test as to his honesty...Such a wrong is not without its remedy. No newspaper or institution, no matter how worthy, has the right to use the name or picture of anyone for such a purpose without his consent.[23]

Although no record of case activity survives, both Pennsylvania and California developed privacy statutes before the end of the century. Invasion of privacy was an "injury wrongfully done to the person," and was included in the Act of June 24, 1895, P.L. (PA)236, ss 2.[24] The California legislative action recognizing privacy occurred in 1899. In so doing, the criminal libel statute (misdemeanor) was modified to include the unauthorized use of the portrait of any person, except for public office holders and convicted criminals, in a newspaper, book, handbill, or poster.

The cases noted illustrate the scope of the legal concern. Although not clearly defined, the concept of a protectable right of privacy was attracting attention in all areas of legal study. However, although the courts noted had no great difficulty in accepting the principle of privacy, not all courts shared this attitude.

The first major denial of any right of privacy came not from New York, but from the Michigan Supreme Court.[25] Although the court could have rested its decision on the limits placed by the courts discussed above, it chose a more sweeping

approach. The application by the widow and children of Colonel John Atkinson for relief from unauthorized use of his name on a brand of cigars might have been rejected either because of "public" character of Atkinson or improper standing of litigants because it was not their privacy at issue. In a direct denial of the Warren-Brandeis concept, the court noted that its sympathy rested with the plantiffs, but that it was compelled to deny recovery: "We can only say that it is one of the ills, that under the law, cannot be redressed."[26]

The first period of legal development of a protectable right of privacy ended with Atkinson. Although other courts had failed to recognize what is, in retrospect, clearly a privacy issue, the Michigan court focused on the abuse, but pronounced itself unable to provide a remedy. Warren and Brandeis had written:

> If the invasion of privacy constitutes a legal injuria, the elements for demanding redress exist, since already the value of mental suffering, caused by an act wrongful in itself, is recognized as a basis for compensation.[27]

Although it seems evident that public awareness of a legal problem and judicial redress were not in accord, this case did not provoke a public outcry. New York provided the case to accomplish that. Abigail Roberson[28] argued that she had been humiliated and caused to suffer great anguish because her portrait had been used on posters advertising Franklin Mills Flour. The headline on the posters read "Flour of the Family." The court of appeals sustained the defense claim that no legal wrong had occurred. Chief Judge Alton B. Parker wrote for the four-member majority:

> An examination of the authorities leads us to the conclusion that the so-called "right of privacy" has not yet found an abiding place in our jurisprudence, and, as we view it,the doctrine cannot now be incorporated without doing violence to settled principles of law by which the profession and the public have long been guided.[29]

He continued to articulate the problems facing the court in the decision at hand: the proposed right was too all inclusive, the classification of actionable wrongs was not specific, the distinction between public and private character was unclear, and differentiation regarding locale of wrongs was vague. These areas of ambiguity could be clarified, according to Parker, only by legislative enactment which could

arbitrarily draw distinctions.

The decision was not popular with the press, many lawyers, and the three-judge minority. The New York Times[30] editorialized: "If there be, as Judge Parker says there is, no law now to cover these savage and horrible practices, practices incompatible with the claims of the community in which they are allowed to be committed with impunity to be called a civilized community, then the decent people will say that it is high time that there were such a law."

The power of the storm created by the decision and fanned by the press and others finally provoked one of the majority, Judge Denis O'Brien, to respond to the attack.[31] After quoting the offending editorial in full, the judge reviewed the background of Roberson and Atkinson; in the process he carefully noted points of disagreement with the editorial. He wrote;

> The right of privacy in such cases, if it exists at all, is something that can not be regulated by law. The rules for the regulation of human conduct with respect to the courtesies and proprieties of life and that enjoin that delicate regard for the feelings and sensibilities of others are not to be found in statutes or judicial decisions...(C)ourts do not make new laws, but enforce those that exist. They have no legislative power. ...Whenever new laws become necessary to supress some evil, resort must be had to the legislature...The right of privacy in the sense conveyed by the criticism upon the decision referred to is such an intangible thing and conveys such a vague idea that it is very doubtful if the law can ever deal with it in any reasonable or practical way... When a court embarks in the business of making new law to suit a particular case it is difficult to stop, as one decision generally furnishes an argument for another. It is easy enough to wander away from beaten paths that are safe, but it is not always so easy to return.[32]

The whole uproar was instrumental in creating a public climate reflected in the passage of a privacy statute less than eight months later. Limited in scope, the measure covered only those instances when an individual's name or likeness was used without consent for trade or advertising purposes.[33] Both injunctive and financial relief were allowed for the plantiff under the statute. Although this was not the first state law concerning privacy protection, it became the model for many other states. Further it is definitely the most frequently used; of the slightly more than 1000 cases[34] dealing with the media and privacy, more than 12 percent are New York cases.

The first major decision dealing with privacy following Roberson came from the

supreme court of Georgia in Pavesich v. New England Life Insurance Company.[35] Reflecting the increasing role of advertising in society, this, again, involved an advertisement which made use of the plaintiff's name and picture, along with a falsified "testimonial." Prosser reported that this case which was based on the example of New York and the passage of several state laws in the other states became the leading case.[36]

Judge Cobb, writing for a unanimous court, presented a lengthy discussion of the various issues involved:

> The right of privacy has its foundation in the instincts of nature... A right of privacy in matters purely private is therefore derived from natural law. It is one of those rights referred to by some law-writers as absolute, "such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it." I BL 123[37]

He continued:

> The right to withdraw from the public gaze at such times as a person may see fit, when his presence in public is not demanded by any rule of law is also embraced within the right of personal liberty. Publicity in one instance and privacy in the other is each guaranteed. If personal liberty embraces the right of publicity, it no less embraces the correlative right of privacy...[38]

Of the role of the individual in controlling his own privacy, he wrote:

> The right of privacy, however, like every other right that rests in the individual, may be waived by him,..., but the existence of the wavier carries with it the right to an invasion of privacy only to such an extent as may be ligitimately necessary and proper in dealing with the matter which brought about the waiver.[39]

Concerning the problem of public or private "character," the Georgia court observed:

> (A)ny person who engages in any pursuit or occupation or calling which calls for the approval or patronage of the public submits his private life to examination by those to whom he addresses his call, to any extent that may be necessary to determine whether it is wise and proper and expedient to accord to him the approval or patronage which he seeks.[40]

The inherent conflict between the public's need for information and the individual's call for privacy evoked this comment:

> The liberty of privacy exists, has been recognized by the law, and is entitled to continual recognition. But it must be kept within its proper limits, and in its exercise must be made to accord with the rights of those who have other liberties, as well as the right of any person who may be properly interested in the matters which are claimed to be of purely private concern. ...The right of privacy is unquestion-

> ably limited by the right to speak and print...the welfare of the public is better subserved by maintaining the liberty of speech and of the press than by allowing an individual to assert his right of privacy in such a way as to interfere with the free expression of one's sentiments and the publication of every matter in which the public may be legitimately interested.[41]

Nizer noted that courts do not easily break with precedent--or the lack of it.[42] The importance of the Georgia decision was established through the careful analysis of the many problems presented through the application of a "natural" right protection of privacy. If "it is natural that the establishment of a new legal principle should be accompanied by dread anticipation of its extreme application,"[43] the detail or Pavesich in the creation of safeguards was vital."

Nizer wrote of this period: "(it was) an era marked by the triumph of the strong man, esoteric concepts such as the right of privacy were spectacularly flouted. In the backwash of this wave of excess, the privacy doctrine was formulated.[44] Its creation at that precise time was historically inevitable." It was obvious that this creation was not uniformly heralded. Judge O'Brien in his defense, supra, wrote that when either the courts or the legislature deals with generalized problems "it often happens that they do more harm than good."[45] As Pavesich opened the definitional-developmental period of the right of privacy, it was obvious that many serious issues remained unresolved.

The first serious definitional attempts focused on unauthorized publication. The acceptance of the privacy doctrine was hampered initially by attempted classification under property rights. If a person's name and likeness has great commercial value and potential for financial profit, then that "future" is marketable. And if it is marketable, it is obviously protectable. To usurp that potential is to engage in appropriation of property. Nizer noted the limits of this standard, "by stressing... (this aspect)... undue restrictions have been placed on the privacy doctrine."[46]

He continued:

> Moreover, the property theory rests upon a palpable fallacy of logic. The existence of a property interest is the result, not the cause, of

> the rule. "Property," by definition, is a bundle of legal rights, including the right to be secure in one's possessions against all the world. If there is any property in a person's name and appearance, it is only because the courts declare that others may not appropriate it at their pleasure; to state that such use will be enjoined <u>because</u> a property right exists is to argue on the basis of an <u>a priori</u> conclusion. (original stress in both instances.)
>
> ...In the last analysis; therefore, the courts which rely on the "property" theory act upon the same impulses of abstract justice as the courts which openly profess to enforce an innate concept of natural right.[47]

Perhaps because of its relative closeness to these more traditional aspects of law, this form of privacy invasion has been the most frequently litigated. It has also been the most uniformly applied across the states and has been the most successful from the plantiff's point of view.[48] Beginning with the very earliest cases, the property aspect has been most evident in those which involved the exploitation of attributes of the identity of the plantiff. Later these cases would be classified under the appropriation tort.[49] As the initial decisions indicate, the courts grappled with the difference between direct use of a name or likeness and use such that it was both advantageous to the defendant and disadvantageous to the plantiff. Clear differences developed between common law and statutory law in this regard. In general, those states in which legislative action had occurred were limited to considerations of monetary gain. The common law application has not been this constrained.

The informational media, i.e., initially only newspapers and magazines, but later documentary motion pictures, radio and television, have presented special problems under the standard legal concept of appropriation. Obviously all the media have existed to make a profit. Equally obviously, however, the public has retained an interest in the content. The safeguarding of a free and unfettered press traditionally has been of such value that the evolving right of privacy could not prohibit publication of that which is of legitimate public interest. Recognized by Warren and Brandeis, and discussed in almost all the early privacy cases, this inherent conflict between these issues has been approached from several directions.

The New York courts were probably those first faced with the special legal tension between the tortious wrong of appropriation and the media.[50] Defining "for purposes of trade" when the issue was direct appearance of a name and or picture in a newspaper forced a partial resolution. Something more than the sale of a newspaper or the presence of advertising matter in adjacent columns was not sufficient to establish "trade" as a viable wrong. Prosser, in commenting on this phase of the history of privacy, wrote:

> Any other conclusion would undoubtedly have been an unconstitutional interference with the freedom of the press. Accordingly, it has been held that the mere incidental mention of the plaintiff's name in a book or a motion picture or even in a commentary upon news which is part of an advertisement, is not an invasion of his privacy, nor is the publication of a photograph or a newsreel in which he incidentally appears.[51]

The problem, however, was much more complicated than the direct property-like right of protection regarding the use of the name or likeness. Every journalist learns early that "names sell" and that "names make news." And every journalist also knows that there is a difference between "public interest" and the "interest of the public." The determination about the protected status of the use of names within the news media has frequently rested on the "legitimacy" of the interest. Nizer has discussed the problem:

> The criterion is not, as the earliest cases intimated, the prominence or distinction of the person whose name or photograph is used; the differentiation between "public" and "private" characters which was advanced during the formative stages of the privacy doctrine has not been accepted. The courts have recognized that public curiosity is a mysterious thing and frequently concentrates most heavily on those least deserving of attention. Thus, not only persons outstanding in the arts and sciences, in statecraft, industry and finance, but criminals, prize fighters, fan dancers and people who try to set endurance records are natural targets of public interest and their names and photographs may be used with impunity in reporting their exploits.[52]

Individual volition had been thought to offer some insight into the quandary. In fact this had been alluded to in the seminal article. Although this standard has held in certain cases, it has been less than absolute. It is possible for the individual to lose any redress under privacy standards simply through the accident of being present at the site of a newsworthy event.[53]

A far greater number, unwittingly and unwillingly, has become public through relationships: familial, social, professional, etc. Merely to have been walking with someone who was assaulted and stabbed to death has been sufficient to deny a claim of privacy.[54] The court acknowledged that "the right to live his life in seclusion" was usually protectable; however, "there are times when one becomes an actor, sometimes involuntarily, in a public event." The court further wrote that a "public good" resulted from the allowed appropriation because the public gained information about the crime and its affect upon those directly involved.[55]

During this same period a series of cases was developing in which news itself was less of an issue. Nizer, in his commentary on privacy, wrote regarding this problem:

> How keen must be the public's desire for information in order to permit a person's name or picture to be used in a "human interest" story, rotogravure section, serialized biography or sports commentator's column?... Although these stories do not necessarily chronicle events of very recent occurrence, they are based on fact and are semi-educational in character... (In general) the individual's right of privacy is outweighted by the public requiring the circulation of information to be unhampered.[56]

The growth and strength of protection for the media has been based on both common law and constitutional law. Lahiri v. Daily Mirror,[57] one of the last cases for a period of time to rehearse the background of privacy, denied protection to the plantiff because the fundamental democratic institutions and general public interest requires the unhampered circulation of news and information.

Public interest in a situation has been allowed to extend beyond the immediate time frame when "legitimate historical chronicles" of events have been at issue. The article "Tropic Vengeance," True Detective Mysteries, reported, well after the fact, the murder trial of one arrested for the murder of the plantiff's daughter.[58] The newspapers at the time of trial had taken and printed pictures of many of the principals in the courtroom drama. A photograph of the plaintiff, seated in the court and looking extremely vindictive, had been included in the newspapers. A photograph quite similar to the ones which had been used by the newspapers was

later used by the magazine, for which use the magazine was sued. Although the trial court had decided for the family of the victim, the appellate court reversed the holding because of "legitimate public interest." That the courts had been rather liberal in interpretation of this standard has been noted regarding many cases; however, one of the most frequently discussed has been Sidis v. F-R Pub. Corp.,based on the New Yorker feature "Where Are They Now?". The author described his subject's early accomplishments in mathmetics and the attention he had been given by the media, expecially radio. The revulsion which Sidis expressed regarding his childhood of fame and study was reported accurately. The article continued to trace his life through attempts to conceal his identity, change his career orientation, and modify his life style. Truth was not a question in the complaint; "(n)or is the manner of the author unfriendly; Sidis today is described as having a 'certain childlike charm'." But the court continued:

> (T)he article is merciless in its dissection of intimate details of the subject's personal life, and this is in company with elaborate accounts of Sidis's passion for privacy and the pitiable lengths to which he has gone to in order to avoid public scrutiny. The work possesses great reader interest, for it is both amusing and instructive; but it may be fairly described as a ruthless exposure to a once public character, who has since sought and has now been deprived of the seclusion of private life.[60]

The court further wrote:

> We express no comment on whether or not the newsworthiness of the matter printed will always constitute a complete defense. Revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency. But when focused upon public characters, truthful comments upon dress, speech, habits, and the ordinary aspects of personality will usually not transgress this line. Regrettably or not, the misfortunes and frailties of neighbors and "public figures" are subjects of considerable interest and discussion to the rest of the population. And when such are the mores of the community, it would be unwise for a court to bar their expression in newspapers, books and magazines of the day.[61]

The second cause of action in this case was based on appropriation for commercial gain which was clearly rejected by the court:

> In this context, it is clear that "for the purposes of trade" does not contemplate the publication of newspaper, magazine, or book which imparts truthful news or other factual information to the public. Though a publisher sells a commodity, and expects to profit from the sale of his product, he

> is immune...so long as he confines himself to the unembroidered dissemination of facts. [62]

The issue has been addressed in a more direct manner in Booth v. Curtis Publishing.[63] The question presented in the case:

> ...whether a person's photograph originally published in one issue of a periodical as a newsworthy subject (and, therefore, concededly exempt for statutory prohibitions) may be republished subsequently in another medium as an advertisement for the periodical itself, illustrating the quality and content of the periodical, without the person's written consent. [64]

The court considered the question in a divided manner. It first addressed the issue of the use itself:

> ...so long as the reproduction was used to illustrate the quality and content of the periodical in which it originally appeared, the statue was not violated...(E)ssential to the holding is that there was nothing in the reproduction which suggested...or could reasonably suggest that Miss Booth had endorsed the magazine.[65]

The commentary regarding the nature of privacy was equally precise:

> ...defendants' contention that a public figure has no right of privacy is rejected. Such contention confuses the fact that projection into the public arena may make for newsworthiness of one's activities, and all the hazards of publicity thus entailed, with the quite different and independent right to have one's personality, even if newsworthy, free from commercial exploitation at the hands of another.[66] The defendants' contention is all the more unreasonable when one contemplates the occasions in which persons are projected into the public arena, that is, into the news, through no volitional choice and sometimes only by mischance or grave misfortune. [67]

The court, however, went beyond the facts of the case in a further comment regarding the issue of collateral and incidental advertising:

> ...(T)he determination is made as a matter of law. It may well be that a news or periodical publisher is doing more than selling a news medium. ...The more rigorous task of analysis, searching the protections surrounding the dissemination of news, must be undertaken before the otherwise inviolable right of privacy is found to be absent. In such a search the determination of whether the advertising is incidental or collateral will conclude the analysis rather than be the question-begging starting point. [68]

Clearly, then, the use has become the basic consideration with regard to appropriation in those states where privacy is protected by statute; it may be so considered within common law, but the consideration is not the initial point of consideration. There can be no question that privacy has been protected in those instances in which

the defendant cannot claim informational protection as established historically in the "public's right to know" rubric. Again, quoting Nizer's commentary:

> Most privacy cases involve, to some degree, "advertising or trade." Learned disquisitions as to the meaning of the words "advertising or trade" merely obfuscate the issue; they do not aid in reaching a rational decision, which must be the outcome of judicious evaluation of the weight to be given in each individual case to the two opposing forces of the private right to seclusion and the public right to information. The only material question is whether the ever-present commercial factor is overbalanced by the educational or informative content of the subject matter.[70]

If appropriation, the oldest of the related torts of privacy, has continued to reflect a history of nice distinctions, analysis of the other forms has been marked with even greater problems in both balancing interests and defining the actual issues. Although appropriation technically is the only right of privacy which is guaranteed in those states having privacy statutes, court interpretations and constitutional amendments have tended to include protection for at least one of the other related torts, intrusion.

Prosser has written:

> Warren and Brandeis, who were concerned with the evils of publication, do not appear to have had in mind any such thing as intrusion upon the plaintiff's seclusion or solitude... The privacy action which has been allowed in such cases will frequently overlap, to a considerable extent at least, the action for trespass to land or chattels. The principle was, however, soon carried beyond such physical intrusion. ... It is also clear that the intrusion must be something which would be offensive or objectionable to a reasonable man. ... It is also clear that the thing into which there is prying or intrusion must be, and be entitled to be, private.[71]

There has been no question about the legality of intrusion: Pember has written that "intrusion upon the solitude and into the private life of a person is prohibited."[72] Although this privacy tort has had the most public attention, its record of cases involving the media has been rather undeveloped. In what was probably the first media related intrusion case, a Washington Herald (D.C.) reporter had taken a picture from the home of the plantiff after she had been found, near death, on the streets of the city. Mrs. Louise Peed had been effected by a gas jet left open in the home of a friend. Upon her recovery she sued for both the theft of and the publication of the picture. Justice Siddons, of the D.C. court, sustained one of the causes of

action and rejected the other. Accepting the defense of newsworthiness about the information in general, the judge, however, took issue with the mode of gaining the information: "If the right to one's person is a right of complete immunity:'to be let alone,' then it would be seriously impaired if, without consent, a picture of his person could thus be obtained by another and published in a newspaper." [73] In so ruling the judge actually preceded statutory protection in the District by approximately twenty years.

The Peed case has been used to illustrate the unique aspect of intrusion; the wrong has not been in the publication, rather the actionable tort has been in the intrusion itself. The picture, information, etc., need not have been used in the media to have established a cause for action; the legal basis for redress, as case law has developed, has been in the gaining of the information through a disruption of expected solitude.

The courts have considered other aspects of intrusion in cases in which several of the privacy torts were considered in parallel causes or complaints. One such case is Sidis; the plantiff had attempted to establish actual malice in the publication. The court apparently selected to combine issues in its response.

> If plantiff's right of privacy was not invaded by the article, the existence of actual malice in its publication would not change that result. Unless made so by statute, a truthful and therefore non-libelous statement will not become libelous when uttered maliciously. ... A similar rule should prevail on invasion of the right of privacy. "Personal ill-will is not an ingredient of the offense, any more than in an ordinary case of trespass to person or to property." [74]

The complexity of the problem of intrusion has been discussed in Barber,[75] which was caused by and in the publication of the "Starving Glutton" picture and story. Th Time article had been written from materials supplied by International and United Press; however, the magazine itself served as the major publication outlet. Interviews with hospital employees and physicians on the case and a picture of the plantif was used in the article. The picture published with the story showed Mrs. Barber, clothed in a hospital gown, in bed; it was a close-up, showing only her face, head, and arms. The article also quoted Mrs. Barber's comments at the time of admittance.

to the hospital. The court wrote:

> Certainly if there is any right of privacy at all, it should include the right to obtain medical treatment at home or in a hospital for an individual personal condition (at least if it is not contagious or dangerous to others) without personal publicity... Certainly plaintiff's picture conveyed no medical information. While plaintiff's ailment may have been a matter of some public interest because unusual, certainly the identity of the person who suffered this ailment was not. Whatever the limits of the right of privacy may be, it seems clear that it must include the right to have information given to or gained by a physician in the treatment of an individual personal ailment kept from publication which would state his name in connection therewith without such person's consent. Likewise...,certainly any right of privacy ought to protect a person from publication of a picture taken without consent while ill or in bed for treatment and recuperation.[76]

By 1969 both the courts and the press encountered a new problem with intrusion. Drew Pearson and Jack Anderson v. Thomas J. Dodd[77] resulted after "the exposure of the alleged misdeed of Senator Thomas J. Dodd of Connecticut by (the) columnists." The District Court, dealing with both conversion of documents which the columnists knew had been removed from Dodd's office and invasion of privacy, granted summary judgment to Dodd on the first charge and denied on the second. The court had discussed at length the legal concept of conversion and general privacy. It is of some historical interest to note that at no time did the court consider the role of the press in situations dealing with misconduct of those elected to office. The court language has been of more than passing concern to both press and legal scholars:

> Appellee complains, not of the misappropriation of property bought or created by him, but on the exposure of information either (1) injurious to his reputation or (2) revelatory of matters which he believes he has a right to keep to himself. Injuries of this type are redressed at law by suit for libel and invasion of privacy respectively, where defendants' liability for those torts can be established under the limitations created by common law and by the Constitution. Because no conversion of the physical contents of appellee's files took place, and because the information copied from the documents in those files has not been shown to be property subject to protection by suit for conversion, the District Court's ruling that appelants are guilty of conversion must be reversed.[78]

Of the many cases concerned with intrusion in the non-trespass classification, few have been accorded the studied treatment by the courts reflected in Briscoe.[79] Reader's Digest had published an article on truck hijacking which named Briscoe, a convicted felon, as one thus involved. The article used no time reference terms other than now, etc.; Briscoe had been rehabilitated for eleven years at the time

of publication. His suit charged that the magazine invaded his privacy with reckless disregard for the fact that reasonable men would find the invasion "highly offensive."

The interplay between the decision and the appeals decision, when combined with the methodical approach used by both courts, has provided material for close study.

> We have no doubt that reports of the facts of past crimes are newsworthy. Media publication of the circumstances under which crimes were committed in the past may prove educational in the same way that reports of current crimes do. ...Thus in an article on truck hijackings, Reader's Digest certainly had the right to report the facts of plantiff's criminal act.
>
> However, identification of the actor (original stress) in reports of long past crimes usually serves little independent public purpose. ...Unless the individual has reattracted the public eye to himself in some independent fashion, the only public "interest" that would usually be served is that of curiosity. ....Where a man has reverted to that "lawful and unexciting life" led by others the Restatement implies that he no longer need "satisfy the curiosity of the public."
>
> Another factor militating in favor of protecting the individual's privacy here is the state's interest in the integrity of the rehabilitative process.[80]

Reflecting the court's awareness of the traditional role of the defense claim of newsworthiness, the language unusually precise:

> We have previously set forth criteria for determining whether an incident is newsworthy. We consider "(1) the social value of the facts published, (2) the depth of the article's intrusion into ostensibly private affairs, and (3) the extent to which the party voluntarily acceded to a position of public notoriety."[81]

The court continued to reflect its awareness of the many problems presented by cases of this type in which legal tension existed. In language which directly addressed the role of the jury in cases like this, the court reported:

> Mindful that "the balance is always weighted in favor of free expression," and that we must not chill First Amendment freedoms through uncertainty, we find it reasonable to require a plaintiff to prove, in each case, that the publisher invaded his privacy with reckless disregard for the fact that reasonable men would find the invasion highly offensive.[82]

The U.S. District Court declared that all the facts in the article were matters of public record. The reasoning evident in the "Findings of Fact" has been cited frequently in other cases and offered significant guidance toward defense claims which have been hisorically sound. First, as stated above, the facts of the article,

except for the problem with time reference, were true; of greater significance, they were also matters of public record in court documents. Second, the author was experienced and was reported to have researched carefully. Next, the publisher, or his representative, was reported to have "responsibly and thoroughly reviewed, researched, and checked" the article prior to publication. Fourth, because none of the participants in the writing or reviewing knew the plantiff and thus were not in a position of direct knowledge, ill will or malice could not be established. Finally although the event in question was somewhat dated, the topic of truck hijacking continued to be of public interest.[83]

Although intrusion has continued to be a problem for the mass media, increasingly so in the immediately past five years, the focus of most scholarship in this area is on governmental intrusion. It should be expected, however, that the trend toward more litigation in this tort will continue. The standards related from Briscoe have gained strength as court considerations in many intrusion cases.[84]

Although intrusion has been a relatively recently major media concern with regard to privacy, the third of Prosser's torts, publication of private information, has a history which includes the Warren and Brandeis article. This has been the most controversial of the privacy torts; there is nothing in present-day court action to indicate that any significant improvement is in the offing. It has been cases in this classification which have so frequently evoked public and governmental wrath. The courts, traditionally, had been protective of the press in many cases; the judicial climate may now be changing. Nonetheless, analysis of the judicial considerations of the past has been helpful in focusing on the special danger areas.

In 1925 a motion picture based on the true story of Gabrielle Darley Melvin was produced for national distribution as an entertainment film. Prior to her marriage to Melvin, Gabrielle had been a prostitute and at one point had been tried for murder. After the acquittal she "became rehabilitated." The motion picture, in relying on the events of her past life, used her former name frequently; advertisements for the film also relied upon use of her name. Melvin[85] initiated action in California court

and won. Justice Emerson Marks anticipated much of the constitutional emphasis which has been placed on privacy in more recent periods. In language which would later be reflected in Briscoe, and to an extent in Hill,[86] Marks wrote;

> When the incidents of a life are so public as to be spread upon a public record they come within the knowledge and into the possession of the public and cease to be private...(T)he very fact that they (incidents in Melvin's life) were contained in a public record is sufficient to negate the idea that their publication was a violation of the right of privacy... (Nonetheless) (t)he use of the appellant's true name in connection with the incidents of her former life in the advertisements was unnecessary and indelicate and a willful and wanton disregard of that charity which should actuate us in our social intercourse and which should keep us from unnecessarily holding another up to the scorn and contempt of upright members of society.[87]

This decision was derived from the California state constitution which granted that "certain inalienable rights" including "pursuing and obtaining safety and happiness" were vested in all people. Marks wrote, in bringing the constitution to bear on the case, "whether we call this a right of privacy or give it any other name is immaterial because it is a right guaranteed by our Constitution that must not be ruthlessly and needlessly invaded by others."[88]

This decision, although frequently dismissed as simply bad law because of its direct contradictions, has had a disproportionate impact on constitutional protection for the right of privacy. A number of issues were considered which apply to the publication of private information. The court expressed reservations about the use in a entertainment format of material, from the public record, which is "offensive." This response was the more important because of the special problems of rehabilitation of felons.

Death itself, although usually considered the end of this tort, has a tradition of creating new privacy issues. One of the earliest such cases was based in the news coverage of the suicide leap of Mrs. Metter from a downtown building. Metter's legal action was an attempt to stop publication of the story and the photographs.[39] The judge denied any relational right of privacy. He further reported that she had, by her own action, waived any right of privacy through the selection of the site for

the leap. Additionally, the court noted that a subsequent investigation had general social value.

The difficulties presented by public records and delimiting state laws surfaced many times during the development of this tort; however, one of the more recent examples is Cox.[90] At issue was the determination of the constitutionality of a state extension of a cause of action which included use of the name of a deceased rape victim. The Supreme Court reported:

> ...(F)or powerful arguments can be made, and have been made, that however it may be ultimately defined, there is a zone of privacy surrounding every individual, a zone within which the State may protect him from intrusion by the press, with all its attendant publicity....More compellingly, the century has experienced a strong tide running in favor of the so-called right of privacy. [91]

The specific privacy claim was "the right to be free from unwanted publicity about his private affairs, which, although wholly true, would be offensive to a person of ordinary sensibilities." [92] But the basis of the conflict at hand was the fact that the material in question was alrady a matter of public record which "however damaging it may be to reputation or individual sensibilities" was absolutely accurate.

After reviewing the background of public records and press rights to so publish, the Court decided:

> Thus even the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the public record...By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served. [92]

The Court concluded by protecting the press with regard to privacy while also allowing for an alternate route for individual protection:

> If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information...Once true information is disclosed to public court documents open to public inspection, the press cannot be sanctioned for publishing it.[93]

Although there have been many other cases involving public disclosure of private information, those selected have illustrated some of the problems with all aspects of the issue. There simply have not been solutions discovered to the conflict between

the individual's propensity for creating private embarrassing facts and the media's skill for discovery and publication. As more records have come into existance and as the media have become more skillful at ferreting out there records, the dimensions of the issue have become more clearly drawn. In the process the last decade has witnessed a rather schizophrenic tendency on the part of the courts to protect the right of media to publish information while at the same time protecting the individual's right to protect that information through techniques which are essentially protective by being restrictive. Complicating still further the issue has been the subtle process of redefining First Amendment rights of the press and working standard of public and private persons and/or officials.

In the complex of issues which have grown around Prosser's four torts, only the fourth, false light, has demonstrated the more traditional developmental patterns of common law. False information has followed very closely the more established area of libel law. Related in law to appropriation, false information has been actionable whether or not the material has been defamatory. The legally redressable harm has been not in lowering a person in the public's esteem, rather it has been in reflection of the individual as anything other than what he/she actually is. The harm, of course, has been partially related to appropriation and intrusion. The cases, and there have been many, follow two patterns; false light which most frequently has been the result of accident or carelessness, and fictionalization which almost always has involved a deliberate or purposeful act.

Pseudodocumentaries have always presented special concerns with regard to this tort. The first case to gain the plantiff a victory under his category was Picture Classics, Inc.[94] A travelogue using actors against the real-life setting of New York, the film included Miriam Blumenthal, a bread peddler, in a very brief group scene. She brought suit against the producer, claiming that trade purposes had been involved and that she had been portrayed in a false light and she won.

Actually two earlier cases had involved comparable situations, Binns[95] and

Merle,[96] however, in both cases the courts denied recovery for damages on the charges. Binns, involved what was a re-enactment of the collision between the Florida and the Republic, two ships off the New York shore. Wireless operator John R. Binns was something of a hero in the event; after the fact, Vitograph, as producer, hired an actor to portray the role but used Binns' name. He was denied recovery on privacy; but was allowed limited redress under libel. Merle, owner of a factory which bore his name on the outside, was also denied recovery when his building, including the sign, appeared in a motion picture on white slave traffic. Other than a difference in time, there are no apparent differences.

The first major privacy case to attract Supreme Court attention was Hill.[97] Although the family had been involved in an event of more than passing news interest, that of being held hostage by escaped convicts, they resented the hero status given through the various media. In addition to the news coverage, the situation was the basis for a novel, The Desperate Hours," and a stage play. The events of the period were re-enacted and changed in each of the transformations. Life magazine, in its coverage of the opening of the play, included copy and photographs of the actors against the background of the actual event, the Hill's Whitemarch home. However, by that time, the Hill family have moved several times to regain their privacy. The family won in both the trial court and the New York Appellate Court. That court wrote:

> Although the play was fictionalized, Life's article portrayed it as a re-enactment of the Hills' experience. It is an inescapable conclusion that this was done to advertise and attract further attention to the play, and to increase present and future magazine circulation as well. It is evident that the article cannot be characterized as a mere dissemination of news, nor even an effort to supply legitimate newsworthy information in which the public had, or might have a proper interest. 98

Many of the problems presented in Hill were resolved in Cantrell.[99] A news feature, which ran approximately nine months after an accident in which Melvin Cantrell was killed, contained a number of inaccuracies and false statements. Most conspicuously, although Mrs. Cantrell was not present at any time during the reporter's visit to her home, the article reported that "Mrs. Cantrell will talk neither about

how they are doing. She wears the same mask of non-expression she wore at the funeral She is a proud women. Her world has changed." The case went to the jury on false light where the Cantrells were awarded damages, and eventually into the Court of Appeals where the judgment was reversed. The Supreme Court reversed again and remanded the case to the Court of Appeals. The key to this decision was in the original instruction given the jury that included a caution regarding imposition of liability only if the article had been printed with knowledge of falsity or reckless disregard of the truth.

This case, and many others like it, was wedded at law to the doctrine of libel. Other cases have been merged with property rights; still others with trade practices. Many critics have argued that there is no need for a right of privacy, that the whole area is an aberation created by well-meaning courts and scholars. Recent event seem to point in the opposite direction. Privacy has become more frequently litigated; it has also become a topic of considerable direct interest to the public at large. Historically, the doctrine developed out of changes in the social climate. It continues to reflect this. Perhaps no other emphasis of American law has been so tied to social change. Wizer wrote in 1941:

> The right of privacy, in the brief span of its existence, has mirrored a contemporary struggle between the rights of the individual and the rights of society...
>
> The right of privacy is the child of these two opposite ideals. Like every new rule of law, it sprang from the spark struck off by clashing principles. With gradual adjustment of the weight given to these forces, a balance of values will be achieved and the right of privacy will reach its full stature as a mature expression of one phase of man's relationship to his fellow-men.[100]

There is no question that he is right, one can only wonder when? Until that time, the law of privacy continues to be like a haystack after a tornado--the pieces are all there, somewhere.

Endnotes

[1] Louis Nizer, "The Right of Privacy: a Half Century's Developments," Mich. L. Rev. 526 at 528 (1941).

[2] Thomas Emerson, The System of Freedom of Expression at 545 (1970).

[3] Samuel Warren and Louis Brandeis, "The Right to Privacy," 4 Harv.L.Rev. 193 at 196 (1890).

[4] Nizer at 528.

[5] E. Emery and M. Emery, The Press and America: an Interpretative History at 243-4 (1978).

[6] Warren and Brandeis at 195, including n.4. [7] Id. at 196.

[8] Id. at 197.

[9] Id.at 198, including n.2 :"It is certain every man has a right to keep his own sentiments, if he pleases. He has certainly a right to judge whether he will make them public, or commit them only to the sight of his friends." Yates, J. in Millar v. Taylor, 4 Burr. 2303, 2379 (1769)

[10] Id.at 208-9. [11] Id.,at 213, including n. 1.

[12] Id.at 220.

[13] Manola v. Stevens, unreported in citations on record but available in report form in New York Times, June 15, 18, 21, 1890.

[14] Mackenzie v. Soden Mineral Springs Co., S.Ct. 1891, 18 N.Y.S. 240.

[15] Schuyler v. Curtis, 19 N.Y.S. 264 (1892). [16] Id.at 265.

[17] 147 N.Y. 434, 42 N.E. 22 (1895). [18] Id. at 447-8.

[19] Carliss v. E.W. Walker, 57 Fed. Rep. 434 (1893); 64 F. 280, D.C. Mass.(1894).

[20] Id. at 281. [21] Id.at 282. [22] 26 N.Y. Supp. 908.

[23] Id. at 910. [24] Don R. Pember, Privacy and the Press, at 64 (1970).

[25] Atkinson v. John E. Doherty & Co., 121 Mich. 372; 80 N.W. 285 (1899).

[26] Id. at 384. [27] At 213.

[28] Roberson v. Rochester Folding Box Co., 65 N.Y.S. 1109 (1900); 71 N.Y.S. 876 (1901 171 N.Y. 538 (1902) at 556.

[29] Id. at 556. [30] August 23, 1902.

[31] The Right of Privacy, 2 Col.L.Rev. 437 (1902). [32] Id. at 445-8.

[33] New York Civil Rights Law, § 50 and 51, now amended.

[34] Figure is approximate and is based on reported decisions, usually appellate leve plus information provided by the Bar Associations of the states.

[35] 122 Ga. 190, 50 S.E. 68 (1905). [36] Privacy, 48 Cal.L.Rev. 383 at 386.

[37] Pavesich at 194. [38] Id. at 196. [39] Id. at 199. [40] Id.at 200.

[41] Id.at 201, 204. [42] Id.at 529. [43] Id. at 531.

[44] At 527. [45] 2 Col L.Rev. at 447. [46] Nizer at 537. [47] Id. at 537.

[48] Based on data presently unpublished, but available from author.

[49] As developed by Prosser.

[50] Although Colyer v. Richard K.Fox Pub. Co., 162 App. Div. 297, 164 N.Y.S. 999 (1914) is the earliest case for which the record actually servives, there are refere ences in Pennsylvania legal history to an earlier case dealing with the same concerns: however, this has not been verified as of this writing.

[51] 48 Cal.L.Rev., see n. 181-187 at 405-7. [52] Nizer at 541.

[53] Case list is avilable from author.

[54] Jones v. Herald Post Co., 230 Ky. 227, 18 S.W. 2d 972 (1929). [55] Id. at 232.

[56] Nizer at 542. [57] 162 Misc. 776, 295 N.Y.S. 382 (1937).

[58] Martin v. New Metropolitan Fiction, 139 Misc. 290, 248 N.Y.S. 359 (1931) and 237 App. Div. 863, 260 N.Y.S. 972 (1932).

[59] C.C.A. 2d, (1940); 113 F.ed 806; cert.denied 61 S.Ct. 393.

[60] Id. at 808. [61] Id. at 810. [62] Id. at 812.

[63] 15 A.D. 2d 343; aff'd without opinion, 11 N.Y. 2d 907.

[64] Id. at 344. [65] Id. at 353.

[66] The court cited Gautier v. Pro-Football, 394 N.Y. 354; Binns v. Vitograph Co., 210 N.Y. 51; Oma v. Hillman Periodicals, 281 App. Div. 240; Dallesandra v. Hold & Co., 4 A.D. 2d 470.

[67] Id. at 353. [68] Id. at 354.

[69] A lengthy listing of cases in which the media are defendant with no claim of such protection is available from the author. Most of these cases deal with advertising directly.

[70] Nizer at 549. [71] 48 Cal.L.Rev. at 389, 391.

[72] Don Pember, Mass Media Law (1977) at 170.

[73] Unreported in citations but discussed in Peed v. Washington Times Co., 55 Wash. L.Rev.182 (1927) at 183.

[74] See n. 59. [75] Barber v. Time, Inc., 159 S.W. 2d 291. [76] Id. at 299-300.

[77] 410 F. 2d 701 [78] Id. at 713.

[79] Briscoe v. Reader's Digest, 4 Cal. 3d 529, 93 Cal. Rptr. 866, 483 P.2d (1971).

[80] Id. at 44-45. [81] Id. at 48. [82] Id. at 49.

[83] 1 Med. L. Rpts. 1852; with apologies for citation, only available source.

[84] More cases have been initiated in this area in the last five years than during the combined years from the inception of this tort. Year-by-year tables will be available upon request.

[85] Melvin v. Reid, 112 Cal. App. 285. [86] Time v. Hill, 385 U.S. 374

[87] Melvin at 290, 292. [88] Id.

[89] Metter v. Los Angeles Examiner, 35 Cal.App. 2d 304 (1939).

[90] Cox Broadcasting Co., v. Cohn, 420 U.S. 469. [91] Id. at 485.

[92] Id. at 508-9. [93] Id. at 510.

[94] Bleumenthal v. Picture Classics, 234 App.Div. 570 (1932).

[95] Binns v. Vitagraph Co., 147 App. Div. 783 (1911); 210 N.Y. 51 (1913).

[96] Merle v. Sociological Research Film Corp., 166 App.Div. 376 (1915).

[97] 18 App.Div. 2d 485 at 489; 240 N.Y.S. 2d 286 at 290.

[98] 385 U.S. 374. [99] Cantrell v. Forest City Publishing Co., 419 U.S. 245

[100] Nizer at 559, 560.